IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

NO. 73-1229

INDIANA REAL ESTATE COMMISSION, THOMAS DICKSON, EXECUTIVE SECRETARY; WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUBER, HARLEY SNYDER, WILLIAM LONG, JAMES BIBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON MC CULLOUGH, EUGENE MC CLAIN, FRED KELLY, WAYNE SMELTZER, MEMBERS OF THE BOARD OF DIRECTORS OF THE INDIANA REAL ESTATE COMMISSION, STATE OF INDIANA,

Petitioners,

-v-

VIJAY V. SATOSKAR, AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

MOTION TO AFFIRM

H. Daniel Friedland
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OPINION BELOW

The Order of the United States Court of Appeals for the Seventh Circuit is unreported, but the Order is set out in Appendix A of Petitioners' Writ.

STATUTES AND REGULATIONS INVOLVED

Indiana Code of 1971, 25-34-1-12, as found in Burns Indiana Statutes Annotated §63-2411(2):

> 63-2411. Minimum standards and requirements for licensure of real estate salesmen and brokers--salesman restrictions. --the Commission shall require all applicants for licensure as a real estate salesman or real estate broker to have and possess the following minimum standards to qualify for licensure:
>
> (2) All applicants must be citizens of the United States prior to submitting an application for licensure.
>
> (10) A partnership or corporation shall be eligible for licensure as a real estate broker upon proper application having been made to the commission by such partnership or corporation: Provided, however, that if the application is a partnership, all members thereof shall have been licensed as such real estate broker, and all of the employees of said partnership active in the sale of real estate, shall be licensed as a real estate broker or real estate salesman according to the terms of this statute. If the application for such license is a corporation, proof must be submitted that such corporation shall have the sponsoring or

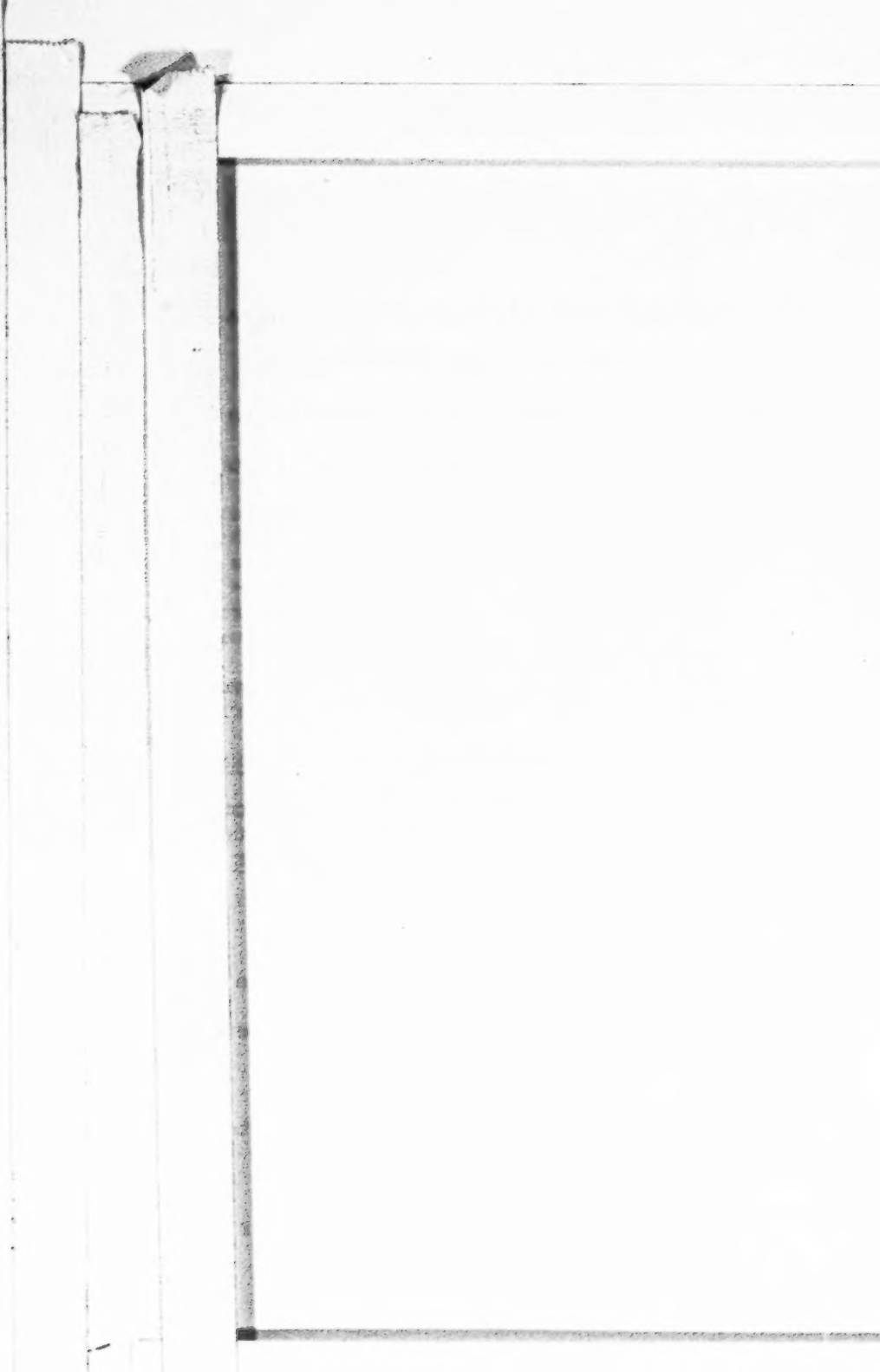
> responsible individual duly licensed as a real estate broker under the provisions of this statute, and that all of the employees, agents and officers of said corporation who intend or do engage in the active sale of real estate or otherwise performing the duties of real estate salesman or brokers under the terms of this act shall be duly licensed as a real estate broker or real estate salesman pursuant to the provisions of this statute.

ARGUMENT

Petitioner has urged two alternative theories to justify abstention in the district court. His first theory may be called "The Full-Record Doctrine." The other theory entails obfuscating the obvious by creating ambiguity where none exists so that the matter be relegated to state courts. Both of these theories are extremely dangerous and are antithetical to a true balance of federal and state judicial systems. Under both theories, if

Harris 401 U.S. 54 (1971) has somewhat revitalized the Pullman Doctrine, allowing the state courts to have a first crack at interpreting the constitutionality of state statutes, the balance has not shifted irretrievably away from federal adjudication of substantial constitutional claims. Zwickler vs. Koota 389 U.S. 241, 248 (1967) is still very much alive and the Seventh Circuit recognizes its applicability to the Satoskar Case in its order:

> "In thus [establishing jurisdiction for the exercise of] federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . .,' Robb vs. Connally, 111 U.S. 624, 637."



they argue this is a special limited circumstance which would justify abstention. They argue that a full record must be made in the state court before any appeal can be made to the Supreme Court. In support of that position, they contend that the statute precluding aliens from securing real estate licenses is ambiguous and open to interpretation.

The ends that the state has gone to find ambiguity when none exists is both comical and absurd. The first feeble attempt to find ambiguity in the statute was suggested in the May 19th order of the District judge where he posits the theory "for example, the Indiana State Courts may construe such term citizen of the United State as opposed to other aliens of less than permanent visa status." The District judge tried to put a constitutional gloss

on an otherwise unconstitutional statute without justification. To do so, the state ignored the plain meaning of the statute. The Seventh Circuit's order on page 2 acknowledges the District Court's rationale was that the Indiana State Courts might construe the word citizen to include alien. The Seventh Circuit's response was: "In this case however, we can see now no ambiguity in the language of the statute which would avoid the Federal question." The Harrison argument would allow for abstention only when the statute is "fairly open to interpretation." The state is not being fair when they play havoc with the plain meaning of the word "alien" and argue by some linguistic sleight-of-hand trick that the state court can construe the word "alien" to mean citizen. If that indeed is the Real Estate

Commission's sincere position, why not stand by that conviction and allow Vijay Satoskar his opportunity to secure a real estate license under their interpretation of alien qua citizen that they now advance in their reasons for granting Certiorari.

The other ground argued by the Real Estate Commission in finding some ambiguity for state court interpretation is that section 10 of the same statute provides that a corporation may secure a real estate license and goes on to say as long as:

> ". . .proof must be submitted that such corporation shall have the sponsoring or responsible individual duly licensed as a real estate broker under the provisions of this statute, and that all of the employees, agents and officers of said corporation who intend or do engage in the active sale of real estate or otherwise performing the duties of real estate salesman or brokers under the terms of this act shall be duly licensed as a real estate broker or real estate salesman pursuant to the provisions of this statute [Burns In. Stat. Ann. §63-2411 (2)].

The stated corporate exception has no bearing on Vijay's claim.

What good does it do Vijay to incorporate since this is basically a one-man operation and he would still be disqualified under Section 2 of the statute from securing a real estate license. Therefore, it is pure fantasy to argue that the Section 10 somehow corrects the constitutional deprivation in Section 2 of a real estate licensing statute. In fact, Section 10 only compounds the constitutional infirmity. Also, as the Seventh Circuit indicates in its footnote, "we failed to see how this exception stated explicitly in the statute has any relevance on the unambiguous language prohibited the aliens from obtaining a license." Therefore, the Seventh Circuit saw the fallacy in the argument for the Supreme Court to read in ambiguity

where none exists is a linguistic distortion that cannot possibly justify abstention.

The State then cites for authority two state appellate court cases, a California case of 1922 and a Colorado case of 1911, one which held that an alien could be allowed into a theatre in the State of California and the other that an alien can get a divorce in the State of Colorado. Neither of these cases have anything to do with abstention or the proposition that there is ambiguity in the Indiana Statute. To exclude aliens from movie theatres and to force them to remain married to an unwilling spouse are untenable positions. It seems ludicrous to exclude the aliens from these activities and the date of these cases show that they preceeded the

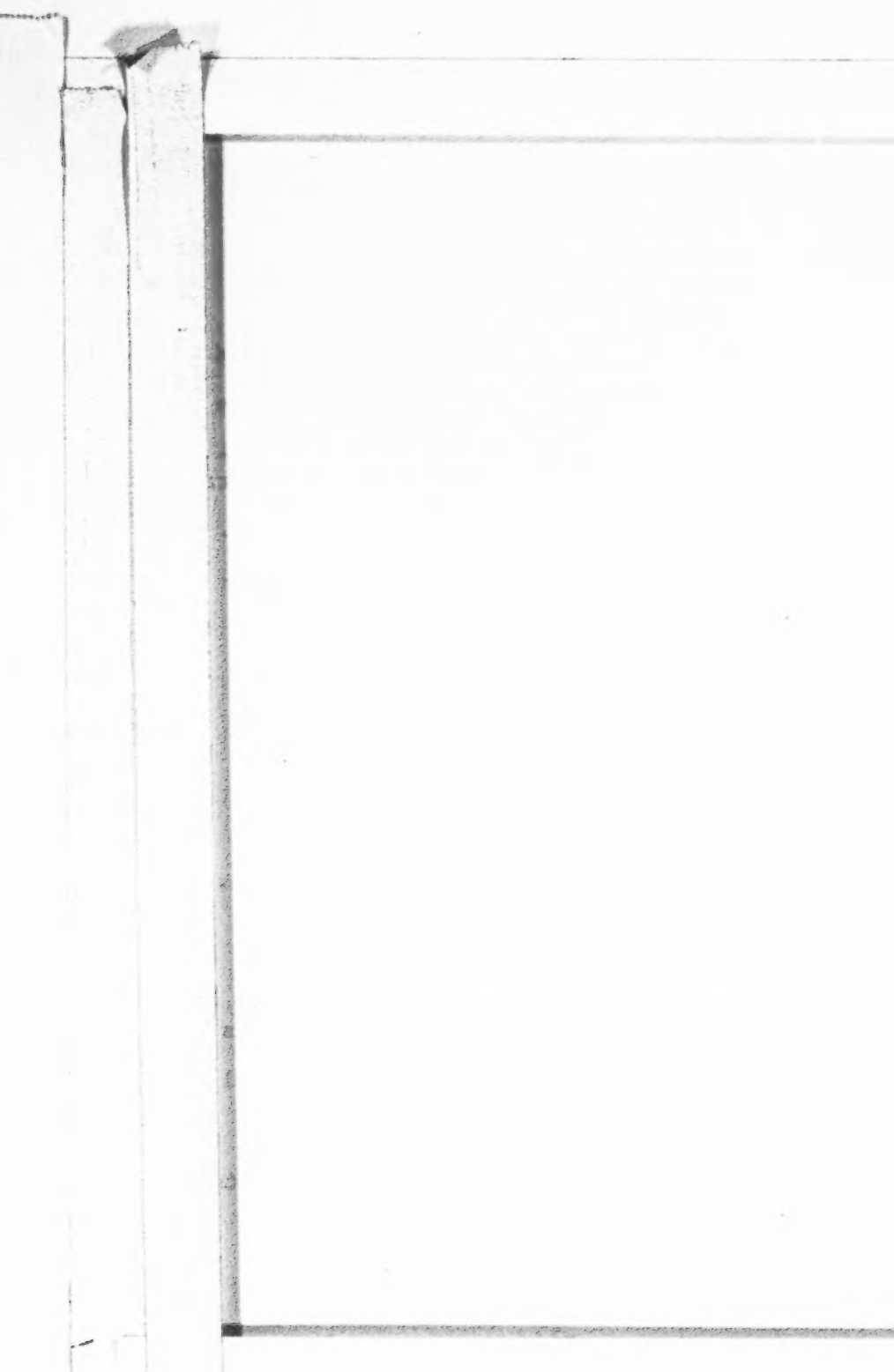
recent barrage of federal litigation dealing with the rights of aliens. None of these cases involve challenges in the federal court and both of these results were inevitably due to the arbitrary nature of the exclusion. While it is quite conceivable that a state court would throw out the challenged state statute on the federal constitutional principles or in the alternative might give the statute a limiting construction to avoid the constitutional issue allowing Vijay to secure his real estate license, nevertheless, this conjecture is irrelevant as to what constitutes the proper application of the Abstention Doctrine.

> "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal

> court to exercise its properly invoked jurisdiction. Baggett vs. Bullitt, 377 U.S. 360, 375-379, 12 L ed 2d 377, 387-389, 84 S. Ct. 1316. Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.' England vs. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-416, 11 L ed 2d 440, 445, 84 S. Ct. 461." [Harman vs. Forssenius, 380 U.S. 528, 534-6, 85 S. Ct. 1177, 14 L. Ed. 50, 55-6 (1965)].

The state statute involved here is clear and unambiguous in all material respects. The Abstention Doctrine, when applied promiscuously, creates a merry-go-round effect with concomitant delay and expense.

Respondent maintains that in areas of vital federal concerns the litigant has a choice of forum. The federal courts are insulated to a great extent from local political concerns and are therefore perfect arbiters of controversial civil rights or civil liberties cases. The federal courts have historically protected funda-



mental constitutional rights particularly in those sensitive areas where local political pressure are brought to bear. The Enactment of 42 USC 1983 was a direct grant to the federal courts of jurisdiction over these kinds of cases. As Justice Douglas so eloquently stated in McNeese vs. Board of Education 373 U.S. 668, 672 (1963):

> "We would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. The First Congress created federal courts as the chief--though not always the exclusive--tribunals for enforcement of federal rights.

The most recent pronouncement by the Supreme Court on abstention, Lake Carriers Association vs. MacMullan 406 U.S. 498, 1972 did allow abstention in a case involving an attempt by an

ecological group in Michigan to enjoin certain watercrafts from polluting Lake Michigan under the Michigan Watercraft Pollution Control Act of 1970. In that case, the court abstained over a dissent by Chief Justice Burger and Justice Powell on the grounds that new federal regulations were coming down to interpret the Michigan Act and clear up any ambiguity. Therefore, there was no real reason for the Federal Court to decide the issue at the time.

The Lake Carriers case again reiterated the Zwickler line of reasoning and emphasized that abstention is a Judge-made doctrine only to be applied under very special circumstances, justifying the time and expense which the application of the doctrine inevitably produces.

To apply the doctrine of abstention to the instant case after this Court has decided in Re Griffiths (41 LW 5143) is to pervert the entire justification behind the abstention doctrine. The case is properly lodged in the federal forum, there is no reason for the federal court this time to defer to a state court determination as to whether Vijay Satoskar, an alien, can secure a real estate license. The rationale in the Griffiths case decided on June 25 of this year forecloses the issue once and for all. Therefore, for the federal court to retain jurisdiction pending an outcome in the state courts on the merits is judicial inefficiency. The intervening Griffiths decision and its implications makes the State Attorney General's Petition for Writ of Certiorari even more puzzling and futile.

At no time has federal jurisdiction been ceded or reduced in civil rights matters, but rather, the federal courts have adopted the judge-made doctrine of abstention to avoid a friction between the federal and state systems. As an accommodation to valid state concerns, federal courts have abstained in cases where a single state adjudication can clear up the linguistic ambiguity and avoid the constitutional question. In the Satoskar Case, the constitutional confrontation between the licensing statute of the state and the Fourteenth Amendment of the Constitution is unavoidable. There is no ambiguity here and unlike Younger vs. Harris and companion cases, there is no prior civil or criminal litigation on this point in the state system. Therefore, the court must not lose sight of its paramount responsibility to adjudicate cases

involving protected federal constitutional rights that are properly lodged in the federal forum. This is particularly true when the statute is on its face unconstitutional and is not subject to a narrowing interpretation in state courts.

In Mitchum vs. Foster 407 U.S. 225- S. Ct. 32 L Ed 2 705, 716, Justice Stewart recently stated the whole concept behind Section 1983:

> "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."

There is no indication that there is any relevant precedent for interpreting the word "citizen," appearing in the Indiana statute, other than as the dictionary definition which is as follows: "A member of a state; a person, native or naturalized, who owes allegiance to a

government, is entitled to protection from it; opposed to alien" (Webster's Collegiate Dictionary). Therefore the definition of citizen is diametrically opposed to that of alien so to construe the meaning of the word to allow Vijay to secure a real estate license, the state court must flip-flop the word "citizen" and replace it with its antonym. This is not a statute that's fairly open to interpretation. This is also not an issue where the litigant must go into the state court and get a full record before he can get into the federal system. This case was properly lodged in the federal forum invoking Section 1983 and the Fourteenth Amendment. Therefore, on both counts, the Seventh Circuit was correct in finding that abstention was improper.

CONCLUSION

Appellee respectfully submits that the Seventh Circuit Court was correct and prays this Court to affirm the judgment of the Circuit Court of Appeals.

PROOF OF SERVICE

STATE OF INDIANA, COUNTY OF MARION, SS:

M. Daniel Friedland, being first duly sworn upon his oath says that he is counsel for Respondents in the above entitled cause and that on the 10th day of September, 1973, he served upon the opposing party in the above entitled cause three (3) copies of Motion to Affirm by depositing same in the United States Mail, postage paid first class at Indianapolis, Indiana, properly addressed as follows:

Theodore L. Sendak
Attorney General of Indiana

Richard C. Johnson
Deputy Attorney General

A. Frank Gleaves, III
Deputy Attorney General

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204

M. Daniel Friedland
Attorney for Respondents

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 10 day of September, 1973.

Notary Public

My Commission Expires: 7-17-77